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UTAH APPELLATE COURTS  
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IN THE UTAH SUPREME COURT

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WANDA EILEEN BARZEE,	:	RESPONSE IN OPPOSITION TO
<i>Petitioner,</i>	:	PETITION FOR EXTRAORDINARY
	:	RELIEF IN THE FORM OF A STAY
v.	:	
HONORABLE JUDITH ATHERTON,	:	Case No. 20080197-SC
<i>Respondent.</i>	:	

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Pursuant to rule 19(c), Utah Rules of Appellate Procedure, Respondent State of Utah opposes Barzee's Petition for an "extraordinary writ ordering that involuntary medication not be initiated during the pendency of Ms. Barzee's petition for certiorari review before the United States Supreme Court, and pendency of the proceedings in that court should the petition be accepted." *See Barzee Petition for Extraordinary Relief* [hereafter *Petition*] at 2. For the reasons stated herein, the State asks this Court to deny the petition for extraordinary relief and to lift the March 11, 2008, emergency provisional stay order.

## **I. Relevant Procedural History.**

In March 2003, Barzee was charged with multiple first-degree felonies and one second degree felony (R. 1-6 & 79). In January 2004, the trial court found Barzee incompetent to proceed to trial and committed her to the Utah State Hospital for treatment (R. 279, 299-307). In June 2006, the trial court ordered Barzee involuntarily medicated to restore her competency (R. 530-567). On December 14, 2007, a majority of this Court affirmed the trial court's involuntary medication order. *See State v. Barzee*, 2007 UT 95, ¶¶ 1 & 77-104; 177 P.3d 48. On January 25, 2008, the matter was remitted to the district court.

During the 42 days between the issuance of *Barzee* and the issuance of the remittitur, Barzee did not move for a “stay or supersedeas of the remittitur or an injunction pending application for review to the United States Supreme Court” as expressly provided in rule 36(b), Utah Rules of Appellate Procedure. Such stays are routinely granted by this Court.

Fifty-six days after the issuance of *Barzee* and two weeks after the issuance of remittitur to the district court, that court ordered Barzee involuntarily medicated as authorized by this Court. *See Petition, Exhibit A*. Barzee moved to stay the medication order pending disposition of her then yet-to-be-filed petition for certiorari in the United States Supreme Court. *See Petition, Exhibit B*. The trial prosecutor opposed the stay on the ground that Barzee had failed to establish that a grant of certiorari was substantially likely. *See Petition, Exh. D*. On March 7, 2008, the trial court denied Barzee's request for stay and again ordered her immediate medication as authorized by this Court. *See Petition, Exh. E*.

Barzee then filed the instant petition for extraordinary relief pursuant to rule 19, Utah Rules of Appellate Procedure, seeking a stay of the involuntary medication order pending disposition of her anticipated petition for certiorari in the United States Supreme Court. *See Petition* at 2. In a section entitled, “NEED FOR EMERGENCY ACTION,” Barzee requested “[p]ursuant to rule 19(c)” that her petition “be immediately granted subject to review by this Court at the earliest time thereafter.” *Id.* at 7.

Rule 19(c) mandates that rule 8A, Utah Rules of Appellate Procedure, be followed when emergency relief is requested. In this case, Barzee did not comply with rule 8A. *See State’s Request for Oral Argument Hearing*, dated March 18, 2008. Within hours of the petition for extraordinary relief being filed and without calling for a response from the State, a justice of this Court provisionally granted the petition and stayed the trial court’s involuntary medication order pending full review by the Court. *See Order, dated March 11, 2008*. The Court then directed respondents to file a response within seven days following service of the petition. *See Letter, dated March 12, 2008*.

On March 13, 2008, Barzee’s certiorari petition was docketed in the United States Supreme Court. *See Attachment A* (Petition for Certiorari Review, United States Supreme Court No. 07-9851 [hereafter certiorari petition]). The certiorari petition raises but one issue: “What standard of review should an appellate court apply when considering the second *Sell* factor[?].” *Id.* The State intends to file a brief in opposition no later than April 14, 2008.

## II. Criteria Guiding the Grant of a Writ in the Form of a Stay.

Pursuant to rule 19, Utah Rules of Appellate Procedure, Barzee petitions this Court for a stay of the involuntary medication order pending federal certiorari review. *See Petition* at 1-2. In seeking extraordinary relief in this Court, Barzee does not claim that the trial court's medication order is unlawful—nor could she in light of *Barzee*. Instead, she asserts only that the implementation of the order should be stayed to allow her an opportunity to seek federal review of *Barzee*. *See Petition* at 2 & 5-7.

Rule 19 guides the procedural requirements for filing the extraordinary writs “referred to in rule 65B, Utah Rules of Civil Procedure,” in the appellate courts. *See Utah R. App. P.* 19(a). However, rule 65B and its interpretative case law establish the substantive criteria a petitioner must meet before an extraordinary writ is issued. The first of these criteria compels Barzee to show that “no other plain, speedy and adequate remedy” short of extraordinary relief is available to her. *See Utah R. Civil P.* 65B(a). *See also State v. Barrett*, 2005 UT 88, ¶ 9, 127 P.3d 682. Second, Barzee must demonstrate that the trial court abused its discretion in denying her request for a stay. *See Utah R. Civil P.* 65B(d); *Barrett*, 2005 UT 88, ¶¶ 23-24. If Barzee meets these initial criteria, she “becomes eligible for, but not entitled to, extraordinary relief.” *Barrett*, 2005 UT 88, ¶ 24.

Before determining if extraordinary relief is warranted in a given case, additional factors and criteria are considered.

For example, factors such as the egregiousness of the alleged error, the significance of the legal issue presented by the petition, the severity of the

consequences occasioned by the alleged error, and additional factors [akin to those considered by the court in exercising “its certiorari review powers”] may all affect the court’s decision to grant or withhold relief.

*Id.* Moreover, when, as in this case, the extraordinary relief sought is a stay pending further review, there must exist a strong reason to believe that Barzee will actually succeed on certiorari.

It is generally required that (a) the applicant [seeking a stay] make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant establish that unless a stay is granted he will suffer irreparable injury; (c) no substantial harm will come to other interested parties, and (d) a stay would do no harm to the public interest.

*Jensen v. Schwendiman*, 744 P.2d 1026, 1027 (Utah App. 1987) (quoting and adopting the federal standard governing stays of judgements pending appeal) (citation and internal quotation marks omitted).

Here, Barzee fails to meet these criteria and, consequently, her petition for extraordinary relief should be denied.

## **II. Barzee Failed to Avail Herself of a Plain, Speedy, and Adequate Remedy.**

Barzee claims that she has no other plain, speedy, or adequate remedy available short of an extraordinary writ to prevent implementation of the trial court’s medication order. *See Petition* at 5. At this point in the proceedings, that is true. Barzee ignores, however, that she placed herself in this position by failing to seek a stay of the remittitur pursuant to rule 36, Utah Rules of Appellate Procedure, when that plain, speedy, and adequate remedy was available to her.

*Barzee* issued on December 14, 2007. Normally, a remittitur would issue 15 days later, on December 29, 2007. *See* Utah R. App. P. 36(a). In this case, the remittitur did not issue for 42 days, not until January 25, 2008. At that point, nearly one-half of the time allowed for filing a federal certiorari petition had elapsed. More significantly, during this 42-day extended period before remittitur, Barzee did not seek a “stay or supersedeas of the remittitur or an injunction pending application for review to the United States Supreme Court” as expressly provided in rule 36(b), Utah Rules of Appellate Procedure.

Barzee excuses her inaction by claiming that she thought she did not need to stay the remittitur because she had a “reasonable expectation” that the State and the trial court would not oppose a stay pending federal review because they did not oppose a stay when she previously appealed to this Court. *See Petition* at 6. But, as the prosecutor explained below, the original stipulated stay enabled the involuntary medication issue to be addressed as a matter of first impression in Utah. *See Petition, Exhibit D* at 3. That stay—and the reasons for it—vanished once this Court issued *Barzee*, authorized involuntary medication, and remitted the case back to the trial court to proceed. *See id.* Since *Barzee*, the State has never agreed to a new stay pending federal certiorari review. *See id.*

In sum, Barzee’s “reasonable expectation” that she did not need to seek a stay of the remittitur is based on mere speculation. This Court should not use its extraordinary writ powers to now save Barzee from her own strategic choices.

#### IV. **Barzee Fails to Show that the Trial Court Abused Its Discretion in Denying a Stay.**

Barzee never identifies the foundational basis for her petition other than rule 19. She apparently claims that the trial court abused its discretion in denying her request for a stay. *See* Utah R. Civil P. 65B(d)(2) (recognizing that extraordinary relief may be granted if a trial court abuses its discretion). An alleged abuse of discretion need not be “gross and flagrant” for a writ to issue, but the “egregiousness of the alleged error is a factor that should be considered” in determining if relief is warranted. *Barrett*, 2005 UT 88, ¶ 26. Moreover, in reviewing a judicial order, this Court’s review “shall extend no further” than to determine if the trial court “regularly pursued its authority.” Utah R. Civil P. 65B(d)(4). *See also Barrett*, 2005 UT 88, ¶ 23 (recognizing that a petitioner has no right to receive a remedy that corrects a lower court’s alleged mishandling of a particular case); *State v. Faux*, 345 P.2d 186, 190 (Utah 1959) (recognizing that extraordinary writs should not “interfere with the proceedings of a court unless it is acting without jurisdiction, or clearly outside of its authority, or where some irreparable harm will result”).

In this case, Barzee does not directly claim that the trial court abused its discretion or committed actual error. *See Petition*. She asserts only that there was no reason not to grant a stay: “It hardly seems important, much less critical, to now feverishly impose the impingement on constitutional rights where Ms. Barzee seeks a modest stay to accommodate the relatively short time period necessary to await response to her petition for certiorari review and a decision from the United States Supreme Court.” *Id.* at 7. The statement

contains three fallacies. Neither this Court nor the trial court has acted with feverish pace to involuntarily medicate Barzee—indeed, 21 months have passed since the original 2006 medication order and nearly three months have passed since *Barzee* issued. Moreover, no court has concluded that involuntarily medicating Barzee would “impinge” her constitutional rights. And finally, the stay requested is not modest in its impact. Since February 8, 2008, the trial court has been attempting to carry out its involuntary medication as authorized by *Barzee*. Those efforts have been hampered and now stopped by Barzee’s stay efforts. Should this Court make the provisional stay permanent pending disposition of the federal certiorari process, Barzee will likely remain unmedicated until June 2008 (the end of the Supreme Court term) and possibly longer.

Barzee also suggests that the trial court should have received a medical update and conducted an update hearing before it issued its medication order because, since the original order, there has been “a complete change of treatment team” and a “significant passage of time without any updated information.” *Petition* at 4 & 6. Barzee does not, however, petition this Court to compel the trial court to conduct such a hearing in the future. Instead, she insists that she seeks only an “extraordinary writ ordering that involuntary medication not be initiated” until the certiorari process is completed. *See id.* at 2. Consequently, no issue concerning an update hearing is before the Court. But even if it were, Barzee presents no basis to support her factual claims.

First, Utah Code Ann. § 77-15-6 (West 2004) compels the state hospital to provide



the trial court with updates on Barzee's progress. Barzee provides no evidence that statutory procedures are not being followed in this case.

Second, there has not been a complete change in the treatment team. Dr. Jeppson was Barzee's primary treating psychiatrist until his death in 2006, except for a couple of months in 2005 when he was on medical leave. *See Brief of Appellee*, No. 20060627-SC [*Br.Aplee.*] at 9. Dr. Cynthia Vitkin treated Barzee during Dr. Jeppson's 2005 medical leave and has been Barzee's primary treating psychiatrist since his death. *See Attachment B* (Affidavit of Dallas Earnshaw, Superintendent, Utah State Hospital). Dr. Paul Whitehead, who testified in favor of Barzee's involuntary medication, has continued in his supervision of Barzee's unit. *See id.* *See also Br.Aplee.* at 14-18.

Third, Dr. Jeppson testified in detail concerning the medications he would have used to treat Barzee. *See Br.Aplee.* at 12-13. The other psychiatrists who testified, Drs. Whitehead for the prosecution and Dr. Raphael Morris for the defense, agreed that this course of medication was medically appropriate, but Dr. Morris challenged the efficiency of the medication to restore Barzee's competency. *See Br.Aplee.* at 9-12. This Court unanimously agreed that the proposed medications were medically appropriate and in Barzee's best medical interest, disagreeing only on whether their efficiency had been established in this case. *See Barzee*, 2007 UT 95, ¶¶ 71-72, 77.

In sum, there is no factual basis to believe that Barzee's medical condition has changed. And while time has passed since the original medication order, that fact does not

establish that the trial court abused its discretion in refusing to further delay involuntary medication. Consequently, Barzee has established nothing more than her disagreement with the trial court's refusal to stay implementation of involuntary medication.

**V. Barzee's United States Supreme Court Petition for Certiorari Is Not Likely to Succeed Because It Poses a Question of State, Not Federal, Law.**

To justify the issuance of a stay, Barzee must make a strong showing that she is "likely to succeed on the merits" on certiorari review. *See Jensen*, 744 P.2d at 1027. Barzee completely fails to make this showing. Indeed, she does not even address it.

Barzee's federal certiorari petition raises but one issue: the applicable standard of review in judging the second *Sell* factor.<sup>1</sup> *See Attachment A*. This is a question of state, not federal, law. Standards of review are typically determined by the law of the forum and not the United States Supreme Court on certiorari review. *See State v. Thurman*, 846 P.2d 1256, 1266-67 (Utah 1993) (recognizing that unless the Supreme Court mandates a standard of review as a matter of substantive federal law, a "standard of review is a question to be

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<sup>1</sup>In *Sell v. United States*, 539 U.S. 166 (2003), a four-part test was established to determine when involuntary medication may constitutionally be used to restore the competency of a criminal defendant to stand trial. Utah has codified the four-part test in Utah Code Ann. § 77-15-6.5 (West 2004). In *Barzee*, this Court unanimously agreed that the first, third, and fourth *Sell* factors were met. A majority of the Court held that second *Sell* factor had also been met. 2007 UT 95, ¶¶ 1, 41, 43, 77-95, 97. The second factor requires the State to establish that involuntary medication would significantly further the state's interests in the case: specifically, the court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial [and at] the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist in conducting a trial defense, thereby rendering the trial unfair." *Sell*, 539 U.S. at 181.

determined by the law of the forum performing the appellate review”). The United States Supreme Court does not grant certiorari to adjudicate questions of state law. *See* United States Supreme Court Rule 10 (providing guidelines for granting certiorari review). Therefore, the Court is unlikely to grant Barzee’s petition for certiorari.

Moreover, since issuing *Sell*, the Supreme Court has consistently denied petitions for certiorari in involuntary medication appeals. *See, e.g., United States v. Gomes*, 387 F.3d 157 (2d Cir. 2004), *cert. denied*, 543 U.S. 1128 (2005); *United States v. Balovinos*, 434 F.3d 233 (4<sup>th</sup> Cir.), *cert. denied*, 546 U.S. 1203 (2006); and *United States v. Evans*, 199 Fed. Appx. 290 (4<sup>th</sup> Cir. 2006), *cert. denied*, 127 S. Ct. 1162 (2007). And just as occurred in *Barzee*, these circuits review findings under *Sell*’s second factor only for clear error. *See Gomes*, 387 F.3d at 160; *Evans*, 199 Fed. Appx. 290. *See also United States v. Evans*, 404 F.3d 227, 236 (4<sup>th</sup> Cir. 2005).

In sum, given the Supreme Court’s acceptance of only 1% of the nearly 6,000 petitions for certiorari filed with it each year, it is highly unlikely that Barzee’s petition for review of the standard of review will be granted.

**VI. Barzee Fails to Show That She Will Suffer Irreparable Harm and that No Substantial Harm Will Come to the State or Public.**

Five years have elapsed since Barzee was charged in this case. Four years have passed since she was found to be incompetent to stand trial. Almost two years have passed since Barzee was ordered involuntarily medicated. Yet, to date, she remains unmedicated and

incompetent.

The constitutional implications of involuntary medication are well-settled. *See Sell*, 539 U.S. 166; *Barzee*, 2007 UT 95. *See also* Utah Code Ann. § 77-15-6.5. Yet, Barzee claims further review is necessary to determine the standard of review for the second *Sell* factor. Though that issue raises no constitutional or federal question, she claims that a stay must be granted because otherwise the “[t]he personal and constitutional harms which Ms. Barzee seeks to avoid but are implicated by the legal issues cannot be redressed once visited upon her.” *Petition* at 5.

Barzee’s claim of irreparable harm exists only to the extent that success on certiorari would result in barring her involuntary medication. As discussed, it is highly unlikely that Barzee will obtain certiorari review. But if even review is granted, it is unlikely that the outcome in this case would change. For as recognized by the majority in *Barzee*, even under a mixed standard, it would still accord great deference to the trial court’s factual findings. 2007 UT 95, ¶ 83.

On the other hand, this Court has already recognized the State’s substantial interest in restoring Barzee’s competency and proceeding to trial. *Barzee*, 2007 UT 95, ¶¶ 39-41 & 77. When a stay is considered, the interests of the victim and public in speedy prosecution must also be considered. *See* Utah Code Ann. § 77-37-3(h) (West 2007). *See also Jensen*, 744 P.2d at 1028. And while those interests may not outweigh a defendant’s legitimate claim of irreparable harm, in this case, as discussed, Barzee’s claim of harm is predicated on the


assumption that *Barzee* is in error.

### CONCLUSION

For all these reasons, Barzee's petition for extraordinary relief should be denied, the provisional stay lifted, and the State be permitted to involuntarily medicate Barzee without further delay.

DATED this 17<sup>th</sup> day of March, 2008.

MARK L. SHURTLEFF  
Attorney General

  
CHRISTINE F. SOLTIS  
Assistant Attorney General

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and accurate copy of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF was <sup>hand-delivered</sup>~~faxed and mailed,~~ postage ~~prepaid,~~ to DAVID FINLAYSON & SCOTT WILLIAMS, Attorneys for Petitioner Barzee, 43 East 400 South, Salt Lake City, Utah 84111, and BRENT JOHNSON, Administrative Office of the Courts, attorney for Respondent Judge Atherton, 450 South State Street, 3<sup>rd</sup> Floor, PO Box 140241, Salt Lake City, UT 84114, this 17 day of March, 2008.

  
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## Attachment A

In The  
**Supreme Court of the United States**

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WANDA EILEEN BARZEE,

*Petitioner,*

VS.

STATE OF UTAH,

*Respondent.*

On Petition For Writ Of Certiorari  
To The Utah Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In *Sell v. United States*, 539 U.S. 166 (2003), this Court established the four factors to be considered when determining whether a defendant's significant constitutional liberty interest in avoiding unwanted administration of antipsychotic drugs may be outweighed by the government's interest in restoring the defendant to competency. The question presented is:

What standard of review should an appellate court apply when considering the second *Sell* factor, i.e. whether involuntary medication will significantly further the government's interest in that it will have (a) a substantial likelihood of rendering the defendant competent; and (b) a substantial unlikelihood of creating side effects that will significantly interfere with the defendant's ability to assist counsel in her defense?

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## PETITION FOR WRIT OF CERTIORARI

Wanda Eileen Barzee respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

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### OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2007 UT 95 (App. at 1-51). The order of the Third Judicial District Court of Utah, Salt Lake County, is unreported (App. at 52-89).

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### JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The decision of the Utah Supreme Court was entered on December 14, 2007. In a split decision, a majority of the court concluded that a "clear error" or deferential standard of review should apply when reviewing the district court's conclusion that administration of antipsychotic medication is substantially likely to render a defendant competent. App. at 40. Although the decision did not conclude all litigation in this case, it is final for jurisdictional purposes because "the federal claim has been fully decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975);

and one alternative second degree felony in relation to the kidnapping of Elizabeth Smart. R. 1-21. On March 27, 2003, the State filed a Petition to Inquire Into Competency of Defendant which the trial court granted after Ms. Barzee stipulated to the same. R. 41-8, 78.

After two independent evaluators found Ms. Barzee incompetent, the trial court entered its findings and conclusions that Ms. Barzee was not competent to proceed on February 4, 2004. R. 293-307. A subsequent competency hearing was conducted on August 10, 2004, and on February 4, 2005, the trial court again found Ms. Barzee was not competent. R. 363-65; R. 367-75; R. 577. Ms. Barzee was again adjudicated not competent to proceed after a third competency hearing conducted on September 2005. R. 425-26; R. 578.

The State filed a Motion for Medication Hearing and for Forced Medication on October 14, 2005. R. 428-30. An evidentiary hearing on this motion was conducted on February 16, 2006. R. 474-75. The trial court entered its decision and order granting the State's motion for forced medication on June 21, 2006. R. 530-68; App. 52-89. Ms. Barzee petitioned the Utah Supreme Court for review of the trial court's decision, which petition was granted on September 20, 2006.

In a split plurality opinion, three justices of the Utah Supreme Court deferred to the trial court's factual findings and thereby upheld the trial court's decision.

the trial court's findings that Ms. Barzee is substantially likely to be rendered competent through forced medication "should be given substantial deference." App. 47.

The majority also disagreed with the dissent's conclusions that the trial court failed to properly weigh all of the evidence and that even under a deferential clear error standard of review, forced administration of antipsychotic medication was substantially unlikely to render Ms. Barzee competent to stand trial. App. 47-9.

The dissent argued for a non-deferential *de novo* standard, stating that higher scrutiny was warranted in light of the "vital constitutional liberty interest at stake." App. 12. Further, the dissent noted that while the analysis was somewhat fact dependant, "the relevant standard by which to weigh these facts is 'competency[,]'" which in Utah is a legal concept. App. 12. Therefore, the dissent argued "more rigorous appellate scrutiny is mandated to protect defendants against constitutional deprivations of liberty." App. 12 (internal quotations and citations omitted).

The dissent further disagreed that an expert witness' appearance and demeanor while testifying about the efficacy of forced medication would have a significant impact on credibility. App. 13. Rather, the dissent pointed out that most of the information necessary to make a determination about diagnosis and research would be reflected in a cold record. App. 13.

separate diagnoses, both evaluators agreed Ms. Barzee is delusional. R. 336-37.

During the second proceeding, Dr. Gerald Berge testified Ms. Barzee suffered from shared psychotic delusional disorder and that he would change his diagnosis to delusional disorder if her delusions did not subside after being separated from the dominant co-defendant in this case. R. 577:19-20, 52. Dr. Berg could not say there was a substantial probability Ms. Barzee would become competent. R. 577:45-6.

During the third competency proceeding, the State was laying the groundwork for forcibly medicating Ms. Barzee. R. 578:24. Dr. Eric Nielsen reported Ms. Barzee had made no progress toward competency. R. 578:8, 24. Dr. Nielsen reported that Ms. Barzee "is fairly rigid in her delusional beliefs[,] she "absorbs herself in the delusion[,] and her delusions impair her ability to recognize she has a mental illness. R. 578: 15-16. However, contrary to all of the prior evaluators, Dr. Nielsen diagnosed Ms. Barzee with psychotic disorder, not otherwise specified ("NOS"), which illness is more likely to respond to medication than delusional disorder. R. 578:10-12, 18-20.

A hearing on the question of forced medication was conducted on February 16, 2006. R. 474-75; R. 579. Dr. Kreg Jeppson who testified for the State was Ms. Barzee's treating physician at the Utah State Hospital ("USH"). R. 579:11, 14. Dr. Jeppson testified, "I am not what you would deem an expert witness. I am a clinician." R. 579:31. His opinion was based

be restored to competency. And it would probably be [his] practice to try one, two or three drugs, and then, if that didn't work, to combine a couple of them." R. 579:18-19.

When asked whether the long duration of Ms. Barzee's untreated psychosis ("DUP") would be a negative factor weighing against the likelihood of her restorability to competency, Dr. Jeppson conceded it was "definitely a factor.... I would have to read on that." R. 579:44-6. Dr. Jeppson admitted, "What we are practicing here is an N of 1. We have to see if she responds or not." R. 579:45. Based on his experience at the USH where delusional disorder is rare, Dr. Jeppson estimated his proposed treatment plan had a 75 percent chance of restoring Ms. Barzee to competency. R. 579:26-7, 30, 49-51.

Dr. Paul Whitehead also testified for the State. His experience was also limited to the USH where delusional disorder is "very rare" and where his only contact with Ms. Barzee was during a short meeting to determine if she met the *Sell* criteria. R. 579:59-60, 76, 81-2. Contrary to all of the other experts who testified, Dr. Whitehead believed that while a diagnosis of delusional disorder was reasonable, the specific diagnosis was immaterial to the question of whether she would likely be restored to competency through antipsychotic medication. R. 579:62, 77-8, 80.

Dr. Whitehead was unfamiliar with the body of research adopted by courts in similar cases expressly finding that delusional disorders are refractive to antipsychotic medication. R. 579:81, 84-6, 87-9, 117, 158-59,

lack of information. R. 579:103-4, 128-29. Because it is inherently inaccurate, Dr. Morris and his staff would only accept a diagnosis of psychotic disorder NOS for about two weeks after a patient's admission. R. 579:132-33.

Dr. Morris testified that DUP is a critical factor weighing heavily against restorability and that the duration of Ms. Barzee's untreated psychosis exceeded 10 years. R. 579:106-8. Dr. Morris based his conclusions upon his own extensive experience treating both responsive and non-responsive patients, and upon the accepted scientific literature and research on the subject, with which Drs. Jeppson and Whitehead were unfamiliar. R. 579:115-16, 197, 120-21. Further, Dr. Morris testified that it was scientifically unacceptable to attempt to predict how Ms. Barzee would respond to antipsychotic drugs simply by extrapolating from general studies or general statistics at the USH. R. 579:117.

Given all of the negative factors weighing against Ms. Barzee's restoration to competency, Dr. Morris concluded that the restoration was not even likely, much less substantially likely. R. 579:122, 128, 137, 145.

Dr. Xavier Amador also testified for the defense. He is a clinical psychologist who received his Master's Degree and Ph.D in clinical psychology from New York University and has been involved with numerous evaluations, psychiatric assessments and diagnoses, and a range of forensic evaluations. R. 579:147. He was trained in both the scientist and practitioner models, conducting and evaluating research and evidence-based



Moreover, Dr. Amador reviewed evaluations, reports, and other materials concerning Ms. Barzee and has spent over 15 hours with her during the course of her residency at USH. R. 579:154, 156. He also reviewed materials prepared by a private investigator, including many hours of interviews with Ms. Barzee's family and others who have some association with her. R. 579:156.

Dr. Amador diagnosed Ms. Barzee with delusional disorder and was "perplexed" as to why Dr. Jeppson changed the diagnosis to psychotic disorder NOS. R. 579:145-55. Dr. Amador testified the criteria set forth in the DSM-IV do not support Dr. Jeppson's change in diagnosis. R. 579:154. He also concurs with Drs. Jeppson and Morris that, even in the unlikely event that Ms. Barzee responds to treatment, her delusions will not be eliminated. R. 579:167. They will still influence her judgment and understanding, thereby impairing her ability to make reasoned choices and weigh strategies and options. R. 579:167-69, 171-72. It is Ms. Barzee's delusions that render her incompetent, not her tendency to talk about them. R. 579:173, 191. Dr. Amador explained that for competency to be restored, there must be a reduction in the certainty of Ms. Barzee's delusional beliefs. R. 579:174. Yet even the State's witnesses testified that if Ms. Barzee responds to treatment, only her outward behavior would change, not her core beliefs. R. 579:174.

experience "trump[ed]" the scientific data such that he was in the best position to determine the likelihood of success in Ms. Barzee's case. R. 559.

Accordingly, the trial court found there was a substantial likelihood of restoring Ms. Barzee to competency through forcible administration of antipsychotic drugs. R. 560, 562.

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### REASONS FOR GRANTING THE PETITION

- A. The deferential standard of review adopted by the Utah Supreme Court conflicts with *Sell* because it fails to adequately protect the significant liberty interest in avoiding forced administration of antipsychotic drugs.

This Court recognized in *Sell* "that an individual has a 'significant' constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Sell v. United States*, 539 U.S. at 177 (citations and some quotations omitted). Concurring in a previous opinion, Justice Kennedy expressed that "absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering an accused competent for trial" while further indicating such instances would be rare. *Riggins v. Nevada*, 504 U.S. 127, 138-39 (1992). This same concern was echoed by the dissent in this case: "The issue of forcibly medicating a defendant for the sole purpose of making her competent to stand trial implicates constitutional liberty interests of the highest degree." App. 13. Given the importance of the liberty interest at stake, it is

adequate to render her competent to stand trial – a legal concept.” App. 12. Whether the second *Sell* factor presents a mixed question of law and fact or one that is primarily factual, it is important for this Court to decide what standard of appellate review will best further the purposes and intent of *Sell*. The result reached by the majority in this case conflicts with that intent and purpose.

A non-deferential *de novo* standard will preserve the significant liberty interest involved by “offering predictable constitutional protections” and by “defin[ing] the boundaries of a substantial constitutional right.” App. 13 (citations omitted). Quoting this Court’s opinion in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 501 n.17, 503 (1984), the dissent in this case further recognized, “When the standard governing the decision of a particular case is provided by the Constitution, the appellate court’s role is of special importance and the stakes are too great to entrust them finally to the judgment of the trier of fact.” App. 14 (citations, quotations, and some punctuation omitted).

The deferential standard of review adopted by the Utah Supreme Court permits an appellate court to ignore the unique characteristics of a particular defendant and thereby undermines this Court’s intent in *Sell* to protect the significant liberty interest in avoiding the forced administration of antipsychotic drugs. As demonstrated by the facts in this case, a deferential standard shields the trial court from scrutiny while undermining

defendant's unique characteristics when determining likelihood of restoration to competency); *see also*, *United States v. Weston*, 255 F.3d 873, 880 (U.S. App. D.C. 2001) (interpreting this Court's opinion in *Riggins v. Nevada*, *supra*, to require "some form of heightened scrutiny" when considering the significant infringement of a defendant's rights when subjected to forced medication).

This subjective inconsistency is further demonstrated by a comparison between the Utah Supreme Court's opinion in this case and the Fourth Circuit's opinion in *United States v. Evans*, 404 F.3d 227, (4<sup>th</sup> Cir. 2005).

The Utah Supreme Court's plurality opinion gave such deference to the trial court that, notwithstanding the acknowledged significant liberty interest at stake, the court accepted the generalities proffered by the State's witnesses, including an admitted non-expert and another who proved to be unfamiliar with the pertinent scientific data, and ignored overwhelming expertise and specific scientific data showing Ms. Barzee is substantially unlikely to be rendered competent if she is forced to take antipsychotic drugs.

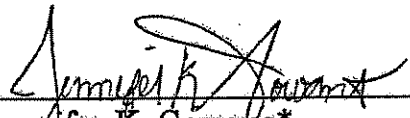
Thus the deference afforded to the trial court in this case sanctioned the application of general and therefore irrelevant data to an unusual and unique patient. In light of the significant liberty interest involved, this result conflicts with *Sell*. However, it further reveals the inherent tendency of deferential appellate review to promote inconsistent application and

defendant is not dangerous and the State's sole purpose is to forcibly render the defendant competent so she can be brought to trial, this Court should grant Ms. Barzee's petition to promote uniformity and fairness and thereby protect the significant liberty interest involved.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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## Attachment B

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IN THE UTAH SUPREME COURT

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Wanda Eileen Barzee, Petitioner	: AFFIDAVIT OF DALLAS
	: EARNSHAW
	:
v.	:
	:
Honorable Judith Atherton,	: Case No:20080197 SC
Respondent	:
	:
	:

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STATE OF UTAH :  
:ss  
SALT LAKE COUNTY :

I, Dallas Earnshaw, affirm the following facts, under oath, to the best of my knowledge, information and belief:

1. I am the Superintendent of the Utah State Hospital.
2. Wanda Eileen Barzee is a patient at the Utah State Hospital, and has been a patient since approximately March, 2004.
3. A "Sell" hearing was conducted to determine whether Ms. Barzee should be involuntarily medicated in February, 2006. At that time, Dr. Kreg Jeppson was her treating psychiatrist.
4. Since February, 2006, the following changes have been made to Ms. Barzee's treatment team:
  - a. Dr. Cynthia Vitko has been treating Ms. Barzee as her treating psychiatrist. Dr. Vitko treated Ms. Barzee for approximately three months in 2005,

and has been the assigned physician since June, 2006.

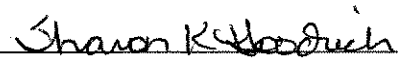
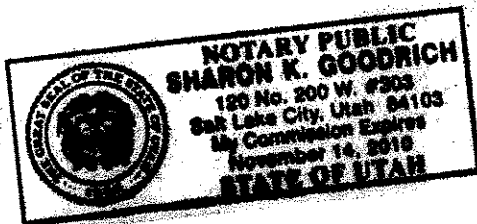
- b. The assigned social worker has changed.
  - c. There have been changes in nursing staff.
  - d. Administrative oversight has remained the same, with the same clinical director and Superintendent.
5. The Unit Nursing Director has remained the same since February, 2006.
6. When changes in staff are made, it is common practice to transition the case from the old staff member to the new one, to promote continuity of care.

Dated this 12 day of March, 2008.



Dallas Earnshaw  
Superintendent  
Utah State Hospital

Subscribed and Sworn to this 12<sup>th</sup> day of March, 2008.



Notary Public